

Simonson



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Americover Company

File: B-234352

Date: March 28, 1989

DIGEST

1. Oral complaint to contracting officer does not constitute a timely agency-level protest since oral protests are not permitted. Subsequent written complaint concerning bid specifications is untimely when filed with the bid since the contracting officer is not authorized to open a bid until the time set for bid opening.
2. Where protester is the fifth lowest bidder and has not contested the acceptability of the fourth lowest bid, the protester is not an interested party to pursue a protest against award to the low responsive bidder.

DECISION

Americover Company protests the award of a contract to Pak Unlimited, Inc. under invitation for bids (IFB) No. R5-05-89-022 issued by the Forest Service, Department of Agriculture, for groundcover mats and wire anchor pins to control vegetation around newly planted trees in Klamath National Forest, California. Americover contends that the specifications are ambiguous and unduly restrictive. The protester further complains that the awardee's bid is nonresponsive.

We dismiss the protest.

The IFB was issued on December 13, 1988. It provided that the groundcover mats had to meet certain minimum requirements regarding, among other things, weight and tensile strength. Bidders were to submit a sample of the groundcover material with their bid. At bid opening on January 23, 1989, the agency received 11 bids. The contracting officer determined that the low bid was nonresponsive and made award to Pak, the second lowest

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bidder, at a price of \$121,392. The protester was the fifth lowest bidder with a price of \$139,200.

A prior solicitation for the mats, which specified that only Exxon Petroleum Company's #31-211 groundcover material product was acceptable and which included the Exxon material's weight and tensile strength, was canceled as overly restrictive. The current solicitation was issued after the specifications were rewritten to eliminate the reference to Exxon. The listed weight and tensile strength remained the same as in the prior solicitation; however, the agency added the notation that these were minimum requirements.

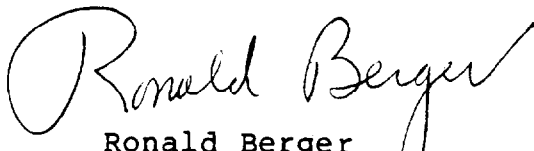
The protester argues that the specifications exceed the agency's needs and are ambiguous. According to Americover, it had the Exxon material tested and while it met the weight and tensile strength requirements on average, it did not meet those specifications in all instances and therefore could not comply with them as "minimum" requirements. Americover maintains that by inserting the phrase "these are minimum specifications" into the current solicitation, the agency effectively raised the quality level and disqualified the Exxon product that it had satisfactorily used in the past. Americover states that it called the contracting officer approximately 1 week prior to the bid opening date regarding the change in specifications. The firm also included with its bid a letter stating that it had found that the Exxon material did not meet the new specifications and suggesting that the agency review its minimum needs since the new specifications would increase the cost to the government.

Our Bid Protest Regulations require that a protest alleging an apparent solicitation impropriety must be filed before bid opening. 4 C.F.R. § 21.2(a)(1) (1988). Contrary to Americover's argument, its oral complaint to the contracting officer does not constitute a timely agency-level protest such that a subsequent protest to our Office would be timely since protests must be in writing. Federal Acquisition Regulation § 33.101; Systonetics, Inc.--Request for Reconsideration, B-231070.2, June 3, 1988, 88-1 CPD ¶ 526. Further, even if the letter submitted with Americover's bid is regarded as an agency-level protest of the IFB specifications it is still untimely. A protest filed with a bid cannot properly be considered as filed before opening since the contracting officer is not generally authorized to open the bid until the time set for bid opening. Federico Enterprises, Inc. dba Federico Helicopters--Reconsideration, B-230724.3, May 11, 1988, 88-1 CPD ¶ 450. Thus, the protest of the specifications is untimely.

Americover also asserts that the awardee's bid is nonresponsive since it will be supplying Exxon's #31-211 groundcover material, which, according to the protester, does not meet the minimum specifications. The agency argues that Americover is not the proper party to raise this issue.

Under our Regulations, we only will consider a protest by an interested party, i.e., an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract. 4 C.F.R. §§ 21.0(a), 21.1(a). A party is not interested to maintain a protest if it would not be in line for award if its protest were sustained. Americover's bid was the fifth lowest. While the low bid was declared nonresponsive, Americover has argued only that the bids of the third lowest bidder and the awardee are nonresponsive since they are both Exxon distributors and will supply the Exxon #31-211 material. The protester has not argued that the fourth lowest bidder will also supply the same product. Americover is therefore not an interested party to raise this argument. First Continental Bank Building Partnership, B-224423, Sept. 3, 1986, 86-2 CPD ¶ 255.

The protest is dismissed.



Ronald Berger
Associate General Counsel